DynCorp *and* Grant Turner *and* American Postal Workers Union, Local 164, AFL–CIO *and* Carl D. Moore *and* Robert Honnerlaw. Cases 9–CA–37324, 9–CA–37635, 9–CA–38049, 9–CA–37486, 9–CA–37744, 9–CA–38053, and 9–RC–17352

December 16, 2004

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 31, 2001, Administrative Law Judge Jerry M. Hermele issued the attached decision.[1] The Respondent, the Charging Party Union, and the General Counsel filed exceptions and supporting briefs, the Respondent filed a brief answering the General Counsel's and the Union's exceptions, and the Union filed a brief answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision, Order, and Direction of Second Election.

The judge addressed multiple unfair labor practice allegations in this case; he found merit in some and dismissed others.[3] In addition, he overruled the objections the Union had filed to the Board election conducted in Case 9–RC–17352. Although the judge concluded that the Respondent had committed several unfair labor practices during the critical period before the election, he found these violations an insufficient basis for directing a second election. Further, among the unfair labor practice claims he dismissed were an allegation that the Respondent's plant manager unlawfully promised the employees benefits just before the election, and an allegation that one of its supervisors unlawfully threatened that the Respondent would terminate a fringe benefit if the Union were voted in.

We adopt the judge's decision except that, for reasons described below, we find that the Respondent did make an unlawful promise and threat, and we direct a second election.[4]

Background

The Respondent has a government contract for the repair of United States Postal Service equipment at a facility near Cincinnati. Duncan Dawkins is the plant manager of the facility, Dale Lawrence is the manager of the second shift, and Wade Moore is one of the Respondent's supervisors. Union activity among the Respondent's employees began in October 1999. The Union filed an election petition on January 24, 2000,[5] and the election was held on March 8. Of 226 eligible voters, 114 voted against the Union and 94 voted for it, with no challenged ballots.

1. The unlawful promise of benefits allegation

On March 6, 2 days before the election, Plant Manager Dawkins gave a final campaign speech to the assembled employees, exhorting them to vote against the Union. In one passage of the speech, read from a prepared text, Dawkins stated:

> Also ask yourself if you think that I now know the issues. You have done a great job of identifying areas that need to be changed. Example: Overtime, workflow issues, seniority issues, supervisory problems, policy issues.
>
> I am forbidden by law to tell you today that I am going to make changes. But I can assure you that I recognize that there are changes that need to be made. It would be foolish for me not to address these issues. In fact it would be quite probable that significant changes would be made long before a contract is ratified.
>
> And don't forget if a union is voted in you won't even have an opportunity to get rid of them for one, two, three or four years AFTER ratification BEST CASE. Would you really want to gamble your current wage guarentees [sic] so that you can pay an organization for the right to work here?

[1] At fn. 1 of his decision, the judge observed that upon publication, "changes may have been made by the Board's Executive Secretary to the original decision of the Presiding Judge." It is the Board's established practice to correct any typographical or other formal errors before publication of a decision in the bound volumes of NLRB decisions.

[2] The Respondent, the Union, and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] No exceptions were filed to the judge's dismissals of allegations concerning (1) the restriction of movement in the plant; (2) the interrogation of employee Stacy Fields; (3) an interrogation by Supervisor Chris Fair; (4) a threat to reduce wages and benefits; (5) offers to transfer employees to a more desirable shift; (6) a speech made within the 24 hours prior to the election; (7) the discipline of employee Grant Turner; and (8) the suspension and discharge of employee Carl Moore.

[4] In light of our finding of additional violations and our direction of a new election, we find it unnecessary to pass on the judge's discussion, in the "Remedy" section of his decision, or on the dissent's discussion, of the Respondent's discriminatory no-posting rule and unlawful interrogations as alleged grounds for setting aside the first election.

[5] All dates hereafter are in 2000.

The judge dismissed the complaint allegation that this passage unlawfully implied a promise that the Respondent would favorably resolve the workplace issues Dawkins had identified if the employees would vote against the Union. The judge concluded that these issues, as stated, lacked specificity, and that the General Counsel had failed to prove that any of these matters were actually problems at the plant.

An employer's promise of benefits during a preelection campaign violates Section 8(a)(1). See, e.g., *Bakersfield Memorial Hospital,* 315 NLRB 596, 600 (1994). Such promises made in the course of urging employees to reject unionization are unlawful because they link improved conditions to defeat of the union. See *Reliance Electric Co.,* 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1973). The use of "cautious language or even a refusal to commit . . . to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions." Id. See also *Superior Emerald Park Landfill, LLC,* 340 NLRB 449, 460 (2003). ("[T]he fact that an employer couches the promises of benefits in language that does not guarantee anything specific does not remove the taint of illegality.") Likewise, it is not necessary, in order to find a promise of benefits to be unlawful, that employee grievances or complaints be identified precisely.[6]

In dismissing this allegation, the judge required the General Counsel to prove that the employees had "problems" with the conditions of employment in the areas Dawkins referred to in his speech. This was error. It is well established that an employer's promise or grant of benefits during an organizing campaign is presumed to influence employees to relinquish their support for the union, and a violation is made out unless the employer establishes a legitimate reason for the timing of its announcement. See, e.g., *Niblock Excavating, Inc.,* 337 NLRB 53, 53–54 (2001), enfd. 59 Fed.Appx. 882 (7th Cir. 2003). There is no requirement that the promise or grant of benefits involve matters with which the employees had "problems." In any event, the Respondent promised improvements in conditions of employment with which Dawkins acknowledged the employees had concerns and wanted changes, including "overtime, workflow issues, seniority issues, supervisory problems, policy issues." Dawkins then implied that he would make changes in those areas when he stated: "I can assure you that I recognize that there are changes that need to be made. It would be foolish for me not to address these issues." Finally, he linked this promise to defeat of the Union when he said: "In fact it would be quite probable that significant changes would be made long before a contract is ratified." The Respondent offered no evidence of any legitimate reason for making this promise 2 days before the election. The coercive impact of the Respondent's promise is most certainly strengthened by the fact that the Respondent promised changes in those areas the employees had identified. Without a doubt, the employees would be particularly appreciative of improvements in those areas. However, the General Counsel was not required to prove that the employees perceived these as problem areas at the plant.

Finally, Dawkins' claim that he was "forbidden by law" from making changes does not immunize his statement if—as happened here—he implied a promise of changes anyway. See, e.g., *Heartland of Lansing Nursing Home,* 307 NLRB 152, 156 (1992); *Pennsy Supply,* supra, 295 NLRB at 325; *Raley's, Inc.,* 236 NLRB 971, 972 (1978), enfd. mem. 608 F.2d 1374 (9th Cir. 1979), cert. denied 449 U.S. 871 (1980). Because Dawkins identified several workplace issues that employees were concerned about, stated that it was "quite probable that significant changes would be made," and made it clear that these changes would occur much more readily if the employees voted against the Union, a reasonable employee would understand the unlawful message. Accordingly, we find that the Respondent violated Section 8(a)(1).

2. The ESOP threat allegation

The judge found that on February 15 Supervisor Moore stated that if the Union were elected the employees would immediately lose the Respondent's 30-cent-an-hour contribution to the Employee Stock Ownership Plan (ESOP). He based his finding on the transcript of an audiotape recording and employee Grant Turner's testi-

[6] See, e.g., *A. O. Smith Automotive Products Co.,* 315 NLRB 994, 1007 (1994) (employer unlawfully promised benefits when, among other things, it stated that some problems had come to its attention during the union campaign, including the problem of overtime scheduling, and that it would try to do something, but couldn't do anything at that time); *Columbus Mills,* 303 NLRB 223, 230 (1991) (employer unlawfully promised benefits when it stated that if employees turned against the union, they would get the things they wanted and the benefits they were seeking); *M. K. Morse Co.,* 302 NLRB 924, 930–931 (1991) (unlawful promise of benefits found where the respondent stated that if the company president were given another chance, he would solve the problems of workers' wages and incentives and would better their working conditions, and that he would be a fool not to address the problems in the shop).

The cases the judge relied on are not to the contrary. In *Bakersfield Memorial Hospital,* supra at 600–601, the judge, adopted by the Board, stated that the employer's communication to employees of a specific benefit to be enhanced was an "indicia"—*not* a requirement—of an unlawful promise of benefit. In *Pennsy Supply,* 295 NLRB 324, 325 (1989), the Board simply stated in passing that the respondent's unlawful promises concerning a health plan and a pension plan "were not general and vague."

mony. However, the judge dismissed the allegation that Moore's statement was an unlawful threat, reasoning that it was not proven that employees other than Turner were present and that it appeared from the tape transcript that Turner had misled Moore into making an erroneous statement about the Respondent's lawful campaign position concerning the ESOP. On review of the record, the tape transcript in particular, we disagree with the judge on both points.

The Respondent's official—and lawful—campaign position was that the ESOP, like other terms and conditions of employment, would be subject to negotiation if the employees elected the Union. But Moore offered an explanation of the Respondent's position to a group of employees that was significantly different—and unlawful.

Employee Turner testified that he recorded one of the Respondent's campaign meetings that Moore conducted for employees. It is reasonable to infer that more employees than Turner were present at the meeting. Indeed, at the end of the transcript, Moore said, "[W]e're gonna go around the room, I want to hear from everybody I want to get everybody's input not just one person."

Further, the transcript itself establishes—even apart from Turner's testimony—that Moore said that if the Union won the election, "30 cents [the Respondent's hourly contribution to the ESOP] you'll automatically lose because you would not be allowed to participate in the Employee Stock Purchase Plan." There is no evidence that Moore was misled or otherwise prompted by Turner into making this statement; the transcript instead indicates that he volunteered it. Further, Moore subsequently repeated twice that employees "would automatically lose" the ESOP contribution.

An employer's preelection statement to employees that, should they choose union representation, they will automatically lose a fringe benefit, such as a profit-sharing program or an ESOP, violates Section 8(a)(1), *Federated Logistics & Operations,* 340 NLRB 255, 268 (2003) (employer violated Sec. 8(a)(1) by threatening that, if the union were selected, employees could lose their 401(k) plan), and interferes with a fair election, *Hertz Corp.,* 316 NLRB 672 fn. 2 695 (1995) (employer interfered with election by creating impression that employees would lose their 401(k) plan immediately on choosing union representation). In light of the record, we find that the judge's dismissal of the relevant complaint allegation was erroneous, and that Moore made an unlawful threat concerning the Respondent's ESOP contribution to an undetermined number of employees.[7]

3. Other unfair labor practices

Our dissenting colleague would find that the Respondent did not engage in an unlawful interrogation when Dale Lawrence, the second-shift manager, offered employee John Groves an antiunion button. The Chairman's position is at odds with well-established Board precedent that:

> When supervisors approach individual employees and solicit them to wear antiunion or proemployer paraphernalia, the employees are forced to make an observable choice that demonstrates their support for or rejection of the union.

Barton Nelson, Inc., 318 NLRB 712 (1995) (footnote citations omitted); see also, e.g., *Circuit City Stores,* 324 NLRB 147 (1997), and cases cited there.

As more fully detailed by the judge, about a week before the election, Lawrence, a mid-level supervisor, approached Groves, whose union sympathies were unknown, and offered him a "Vote No" button. Groves took the button in full view of Lawrence, thus, making an "observable choice." This is precisely the kind of coercive circumstance that the Board law condemns. Lawrence's comment that he did not think Groves would take the button merely confirmed the Respondent's observation of Groves' coerced choice. Moreover, this was one of several similar incidents during the organizing campaign where the Respondent unlawfully sought to ascertain the union sympathies of employees by reference to both prounion and antiunion buttons.

Unlike our dissenting colleague, we do not minimize this incident as being merely "of a casual, playful nature." *McDonald's,* 214 NLRB 879, 882–883 (1974), where a supervisor pinned a "Vote No" button on an employee's shirt and left without observing the employee's reaction, is distinguishable; that employee was not forced to choose whether to accept the button presented by his supervisor.

We also disagree with the dissent with respect to the Respondent's unlawful threat to create more onerous working conditions for employee Phillip Henderson. As the judge explained in detail, during the critical period Lawrence unlawfully interrogated Henderson about his union support. On finding out the extent of his union activities, Lawrence expressed his disappointment to Henderson. The very next day, Lawrence, through Su-

[7] Even if Moore made this threat only to Turner, a violation would still be established because Turner was a statutory employee. Thus, the judge erred on this ground as well.

pervisor Wade Moore, rejected Henderson's request for assistance on the work floor, even though similar requests had routinely been previously granted to Henderson. Despite Lawrence's decision, Moore subsequently granted Henderson's assistance request. The judge found that the timing of the initial denial of assistance revealed a relationship with Lawrence's unlawful interrogation the day before, and the denial was, therefore, an unlawful threat. We agree.

4. The election

There are clear grounds here for setting aside the election, contrary to the judge. They include the unfair labor practices found by the judge, as well as those the judge should have found.

The judge found that the Respondent committed several unfair labor practices during the critical period before the election. Shift Manager Lawrence unlawfully interrogated employee Phillip Henderson and then, with Supervisor Moore, unlawfully threatened him with more onerous working conditions. Lawrence also unlawfully interrogated employee Harold Godbey and, in a separate incident, unlawfully interrogated employee John Groves. About a week before the election, Supervisor Tim Wolfe unlawfully interrogated employee Linda Reynolds and, according to Reynolds' credited testimony, "quite a few" other employees witnessed this unfair labor practice.[8] These unfair labor practices are coextensive with the Union's second objection to the election.

In addition, we have found that Moore unlawfully threatened employees with the loss of their ESOP benefit. This unfair labor practice is coextensive with the Union's fourth objection.

Finally, we also have found that Plant Manager Dawkins unlawfully promised employees benefits if they would vote against the Union. This incident is unrelated to any of the Union's objections. However, it was uncovered during the Region's investigation of the Respondent's alleged unfair labor practices, and it occurred within the critical period. Accordingly, it may be considered as conduct interfering with the election. See, e.g., *White Plains Lincoln Mercury,* 288 NLRB 1133, 1136–1139 (1988).

The Respondent's unlawful actions may well have affected the outcome of the election. Dawkins' promise of benefits was made 2 days before the election, and to most, if not all, of the employees eligible to vote. Therefore, this objectionable conduct alone is sufficient to set aside the election. See, e.g., *Yale Industries,* 324 NLRB 848, 849 (1997); *Toys-R-Us, Inc.,* 300 NLRB 188, 190 (1990). However, the Respondent also committed six other unfair labor practices during the critical period, all of them contributing to a pattern of interference with employee Section 7 rights and coercion of employees while their choice concerning the Union was pending. Taking account of all of these incidents of misconduct, we will set aside the results of the March 8 election, and remand the representation case to the Regional Director for the conduct of a new election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, DynCorp, West Chester, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from posting union literature on its bulletin boards or threatening employees for posting such literature.

(b) Interrogating or soliciting employees about their union activities, membership, or sympathies.

(c) Threatening employees with more onerous working conditions because of their union support.

(d) Threatening employees with the loss of their employee stock option (ESOP) benefits if they choose union representation.

(e) Promising to make improvements in employment conditions if employees vote against union representation.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove the "For DynCorp business use only" sign from the Company's bulletin boards and rescind the rule prohibiting the posting of union literature on company bulletin boards.

(b) Within 14 days after service by the Region, post at its West Chester, Ohio facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[8] The judge failed to observe that other employees were present at the time.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on March 8, 2000, in Case 9–RC–17352 be set aside, and that this case be severed and remanded to the Regional Director to conduct a new election when he deems it appropriate.

[Direction of Second Election omitted from publication.]

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would dismiss the allegation that the Respondent unlawfully interrogated employee John Groves. I would also adopt the judge's dismissal of allegations relating to the alleged promise of benefits and the alleged threat to discontinue the Respondent's Employee Stock Ownership Plan (ESOP) contribution if the Union prevailed in the election. However, as to the last point, I would do so for reasons different from those stated by the judge. I do not agree that Supervisor Dale Lawrence made an unlawful threat as to Phillip Henderson. I agree with my colleagues with regard to the remaining violations, but would find them insufficient to warrant a second election. I, therefore, would direct the Regional Director to issue the appropriate certification.

1. Contrary to the judge and my colleagues, I disagree that, by offering employee Groves a "Vote No" button, Supervisor Lawrence forced Groves to "make a declaration of his support, regardless of the truthfulness thereof."

The Board has held that an employer's distribution of antiunion material is not unlawful, absent some form of coercion or pressure on the employee to receive it. *McDonald's,* 214 NLRB 879 (1974). Here, there is no evidence that Groves was pressured into taking an antiunion button, wearing the button, or declaring his support for or against the Union. Nor do I agree that Lawrence's statement to Groves, after the latter accepted the button, that "I didn't think that you were going to take it," reasonably would tend to coerce Groves. Indeed, such a statement would support the view that Groves was free to refuse the button. Viewed in its totality, I find that the exchange was of a casual, playful nature, rather than coercive. Accordingly, I would adopt the judge's findings and dismiss this allegation and concomitant election objection. *McDonalds,* supra at 883–884.

I do not agree with my colleagues that the statement in *Barton Nelson*, *Inc.,* 318 NLRB 712 (1995), represents a per se rule. The Board, in response to judicial criticism, has rejected a per se approach to issues involving alleged interrogation.[1] The Board looks to all of the surrounding circumstances. In addition, the per se rule proffered by my colleagues would mean that an employer could not individually distribute any materials opposing a union campaign. There would obviously be some tension between such a rule and Section 8(c). For these reasons, I believe that the question is whether the distribution here, reasonably perceived, was coercive in the circumstances. For the reasons indicated above, I conclude that the evidence does not establish such coercion.[2]

2. I further disagree with my colleagues that Plant Manager Duncan Dawkins unlawfully promised employees benefits if they voted against the Union. During a speech prior to the election, Dawkins stated that the campaign had made him aware of employees' concerns. He also stated that he was forbidden by law to make promises. The majority asserts that a reasonable employee would interpret Dawkins' speech as a promise to change conditions in their favor if they voted against the Union. My colleagues also argue that Dawkins' statement (that he is forbidden by law to make promises) did not neutralize the assertedly coercive nature of that promise.

I do not agree that employees reasonably would have interpreted Dawkins' speech as promising benefits if they voted against the Union. Rather, I find that Dawkins' statements assured employees that Dawkins would address their concerns without regard to whether the Union won or lost the election.

Dawkins clearly stated that law forbade him from promising changes but that he would be "foolish not to address those issues." In addition, there is nothing in Dawkins' speech that conditions improvements in the employees' working conditions on voting against the Union.

My colleagues seize upon the Dawkins' statement that it would be quite probable that significant changes would

[1] *Rossmore House,* 269 NLRB 1126 (1984).

[2] My colleagues say that "Lawrence's comment that he did not think Groves would take the button merely confirmed the Respondent's observation of Groves' coerced choice." However, that statement puts the proverbial rabbit in the hat. The issue is *whether* there was coercion.

be made long before a contract is ratified. It is a classic nonsequitur to infer from that statement the notion that changes would not be made if there were no contract to be ratified, i.e., if there were no union. Indeed, Dawkins stated that he recognized the need for changes. There is nothing to suggest that his recognition of the need was dependent upon the election results. To the contrary, both logic and language suggest that the need existed independent of the election results.

Based on all of the above, I would adopt the judge's dismissal of this allegation.

3. The majority next finds, contrary to the judge, that the Respondent unlawfully threatened to suspend its ESOP contribution if the Union won the election. My colleagues find that Wade Moore's statement (that employees would lose the Respondent's 30-cent-per-hour contribution toward the ESOP if the Union won the election) is an unlawful threat of reprisal if the Union prevailed. Based on the record testimony, I disagree. Although I reject the judge's speculation that prounion employee Grant Turner "cunningly led Wade [Moore] off message," I agree with the judge's finding that Moore's comments were "rambling and somewhat incoherent." Given the muddled nature of Moore's comments, it is necessary to examine the entire context in which they were made, rather than focus on an isolated comment. Taken as a whole, Moore's statements reasonably convey the lawful message to employees that, if they vote for the Union, all benefits will become subject to future negotiation with the Union. Given this context, a reasonable employee likely would view Moore's statements—not as a threat of loss of benefits if the Union won the election—but, rather, an explanation that the ESOP contribution would be subject to negotiation with the Union. On this basis, I would adopt the judge's dismissal of this allegation.

4. I do not adopt the judge's further findings that the Respondent violated Section 8(a)(1) when Supervisor Moore told employee Phillip Henderson that Moore had been instructed by another supervisor, Lawrence, not to provide any further assistance to Henderson until Henderson met his production quotas.

My colleagues suggest that the denial of assistance was motivated by protected activity. However, the denial of assistance is not the alleged violation. The alleged violation is the statement made to Henderson by Moore. In my view, the statement was not unlawful. Moore did not refer to Henderson's union activities and no such linkage reasonably can be inferred from the content of Moore's remarks. Rather, the remark was expressly linked to Henderson's production problems.

My colleagues rely on the timing of the incident, i.e., directly after Lawrence learned of Henderson's union activity. However, that would prove, at most, that Lawrence's denial of assistance was unlawful. As noted, that is not even alleged as unlawful. Further, given the content of Moore's comments, Henderson's ongoing production problems, and the fact that Moore ultimately reversed his decision to provide Henderson with assistance, I would find no unlawful threat. I would, therefore, reverse the judge's findings on this issue.

5. Finally, while I agree that the Respondent violated the Act by its promulgation of a discriminatory no-posting rule and by interrogating employees Henderson, Harold Godbey, and Linda Reynolds, I do not find that these violations are sufficient to warrant setting aside the election and ordering a second election. The Board has stated that 8(a)(1) conduct that occurs during the critical period will also warrant a new election, except where the conduct is so minimal or isolated that "it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.,* 278 NLRB 498, 505 (1986).

Although I question the narrowness of the exception, I accept it here, for no party seeks to broaden it. I find that the instant violations would not constitute objectionable conduct even under the "virtually impossible" standard.

With regard to the interrogations, the Board has previously found that isolated instances of interrogations or threats, which were not disseminated to the other unit employees, could not reasonably affect the results of an election. *Bon Appetit Management Co.,* 334 NLRB 1042 (2001). In the instant case, the interrogations affected only three employees (Henderson, Godbey, and Reynolds). There is no evidence that news of these interrogations was disseminated to other unit employees. The Union lost by 21 votes.

In a similar vein, I would not find that the Respondent's "no posting" rule was objectionable. The Board has found that unlawful rules may not be objectionable where they have not been enforced or have not prevented employees from discussing the terms and conditions of their employment with a union or other employees. *Safeway, Inc.,* 338 NLRB 525 (2002). Here, the Respondent's rule was directed to *all* nonbusiness posting, not just union-related postings. Further, there is no evidence that the prohibition on posting on the bulletin board actually prevented employees from receiving information from the Union or from each other about union events. Furthermore, there is no showing that the Respondent disciplined any employee in connection with this rule. It is speculative to say that any employee was deterred from posting. No employee so testified. In any

event, there were many other means of communication. Finally, the rule was promulgated months before the election, outside the critical period. For these reasons, I would not find the rule to be objectionable.

Accordingly, I would direct the Regional Director to issue the appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from posting union literature on our bulletin boards or threaten employees for posting such literature.

WE WILL NOT interrogate or solicit employees about their union activities, membership, or sympathies.

WE WILL NOT threaten employees with more onerous working conditions because of their union support.

WE WILL NOT threaten employees with the loss of their employee stock option (ESOP) benefits if they choose union representation.

WE WILL NOT promise to make improvements in employment conditions if employees vote against union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL remove the "For DynCorp business use only" sign from our bulletin boards and WE WILL rescind the rule prohibiting the posting of union literature on our bulletin boards.

DYNCORP

Patricia Rossner Fry, Esq., for the General Counsel.
Alice J. Neeley and *Michael W. Hawkins, Esqs. (Dinsmore & Shohl LLP),* of Cincinnati, Ohio, for the Respondent.
Peter J. Leff, Esq. (O'Donnell, Schwartz & Anderson, P.C.), of Washington, D.C., for the Union.

DECISION[1]

STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. On March 8, 2000, the employees of the Respondent (DynCorp) voted 114 to 94 against being represented by the American Postal Workers Union, Local 164, AFL–CIO (the Union). Thereafter, in complaints issued on May 1, June 6, and August 14, 2000, and January 4, 2001, the General Counsel alleges that the Respondent committed numerous violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act), before and after the election. As for the election itself, the Union filed objections thereto, which were consolidated into the instant complaints. In various answers filed in 2000 and 2001, the Respondent has consistently denied any wrongdoing.

So a trial was held on March 12–15, 2001, in Cincinnati, Ohio, during which the General Counsel presented 19 witnesses, the Union presented one witness and the Respondent presented 13 witnesses. Briefs were then filed by the General Counsel on April 17, the Respondent on April 19, and the Union on April 20.

FINDINGS OF FACT

DynCorp, based in Reston, Virginia, is a diversified government contractor with six sites in the nation devoted to the United States Postal Service (USPS). At these sites, one of which is in West Chester, Ohio, just north of Cincinnati, USPS equipment such as mailbags, containers, and transport equipment is inspected and repaired. DynCorp began building the West Chester facility in October 1998 and employees were hired beginning in April 1999, with production starting in May 1999. Annually, the Company performs services at the West Chester facility exceeding $50,000 for its sole customer, the USPS (GC Exhs. 1(uu), (ww); Tr. 18–20, 42–43, 50). At the plant's peak operation in early 2000, there were three shifts operating 7 days a week with 300 or so employees. By early 2001, however, operations decreased to two shifts, 5 days a week, with about 200 employees (Tr. 33–35, 47–48).

Duncan Dawkins has been the West Chester plant manager since the opening thereof (Tr. 18). At the outset, employees were given a handbook setting forth the Company's employment policies, including the following:

DISCIPLINARY WARNINGS

Whenever an employee's breach of work rules, misconduct, poor performance or other unacceptable conduct comes to the attention of DYNCORP, the employee may receive a disciplinary warning. Such a warning is intended to make the employee aware of the seriousness of the problem and the need for immediate corrective action.

All warnings will be delivered privately in both oral and written form. The employee will be asked to sign the written warning and will be given a copy if requested. In addition, a copy of the written warning will be placed in the employee's personnel file.

[1] Upon any publication of this decision by the National Labor Relations Board (the Board), changes may have been made by the Board's Executive Secretary to the original decision of the presiding judge.

> DYNCORP reserves the right to take other disciplinary action deemed appropriate under the circumstances, including demotion, suspension or termination of employment in lieu of a warning.
>
> If an employee believes a warning is not justified, the employee is entitled and encouraged to freely discuss the situation with his or her supervisor. If the matter cannot be resolved through such discussion, or if the employee believes that such a discussion would be unproductive, the employee may make a written report to the Plant Manager or Human Resources Representative and request that the Plant Manager or Human Resources Representative review the warning and investigate all relevant circumstances.
>
> The DYNCORP Cincinnati division's disciplinary policy is as follows:
>
> (1) Oral Warning (written for documentation purposes)
> (2) Written Warning
> (3) Final Written Warning with 3-day suspension
> (4) Termination

(GC Exh. 2.) Employees hired after the plant's opening, however, did not receive this handbook (Tr. 21–23). But DynCorp also had written "Standards and Conditions of Employment," which provided "a list of conditions under which disciplinary action toward, or discharge of, an employee may occur." One of those conditions was "fraud or dishonesty," set forth as follows:

> Misusing or abusing Company policy such as: excused absences, leaves of absence; falsifying time sheets; failing to give complete information for personnel and/or security records; making false statements, either oral or written, about the Company, other employees, supervisors, yourself, or work situations.

(GC Exh. 4.) Employees Grant Turner and Robert Honnerlaw received this information in 1999 (R. Exhs. 2, 22). The Company also issued, in December 1999, a memorandum regarding disciplinary actions. Therein, three reasons were listed to warrant an employee's discharge: continued unsatisfactory performance, policy violation or gross misconduct. Also, examples of policy violations included "timecharging, harassment, insubordination, theft, etc." (GC Exh. 3.)

In October 1999, two employees in the container repair department, Grant Turner and Danny Hollon, began an effort to organize the plant's employees for the Union (Tr. 275–276, 325). To this end, in December 1999 Turner handed out, and posted on one of the plant bulletin boards, located in the cafeteria, a "notice" seeking "a list of interested parties" for the Union. Turner signed the notice (GC Exh. 5; Tr. 203, 326). Employees had previously used the Company's bulletin boards to post personal messages such as items for sale and thank you cards (GC Exh. 11; Tr. 202, 328–329). Though Dawkins maintained that supervisors told employees not to post items, no employee was ever disciplined for posting anything on a bulletin board. Dawkins learned of the union notice and asked Turner if he posted it. Dawkins then told him that the bulletin boards were for company use only and that he would be disciplined if he posted something like this again. And shortly after this conversation, management put a sign on the bulletin boards stating "For Dyncorp Business Use Only." (Tr. 38–40, 202, 327–328, 331, 416–417.)

In early January 2000, employees began passing out prounion buttons and distributing literature. (GC Exhs. 14–15; Tr. 290, 333–334.) On January 24, the Regional Director for Region 9 sent Dawkins a letter notifying him that a petition, seeking an election pursuant to Section 9(c) of the Act, had been filed that same day. (GC Exh. 1(k); R. Exh. 8.) On February 3, the election was scheduled for March 8. (GC Exh. 1(k).) Shortly thereafter, Dawkins contacted company headquarters in Virginia, who sent someone to West Chester to train the supervisors about the dos and don'ts regarding their interaction with employees during a union election campaign (Tr. 797).

The nucleus of the prounion movement was the second-shift employees in the container repair department (Tr. 41–42, 334–335). These employees were separated by a wall from the warehouse department employees. A walkway existed, with a railing, on the south side of the wall visible to the warehouse department. The processing employees, however, were located on the same, or north, side of the wall as the container repair employees. (R. Exh. 15.) Supervisor Wade Moore often told employees to walk on the south side enroute to the cafeteria so as not to impede production or cause safety problems in the processing area, including before the union effort began (Tr. 556, 564–565, 613–614). In this regard, Supervisor Dale Lawrence so instructed Moore in January 2000 when he noticed employees on their way to the cafeteria impeding production by talking to employees who were working (Tr. 677, 694–695). Moreover, in a November 24, 1999 memorandum to all employees, Dawkins stated that "[a]ll . . . employees should enter the West end of the building and proceed through the building in the aisleway on the South side of the demising wall" on their way into or out of the plant from the parking lot (R. Exh. 14; Tr. 829). According to Turner, the day after the union buttons appeared at work, container repair supervisor Wade Moore told Turner to walk along the south side of the wall not visible to the processing employees, on his way to the cafeteria. So, Turner received a written "Memo for the Record." (GC Exh. 18; Tr. 336, 569, 599.) This was the first time Moore issued such a discipline, or needed to (Tr. 618–620). Employees Danny Hollon, Williamson agreed that management changed the route to the cafeteria after the union effort began. According to Williamson, this was done to prevent the prounion container repair employees from talking to processing employees on the way to the cafeteria (Tr. 206, 232–235, 276–277). Moreover, Williamson testified that after January 2000 the container repair employees were further isolated by having their breaktimes changed, which used to coincide with the processing employees (Tr. 233–234). But Supervisor Lawrence maintained that the different departments always broke at different times (Tr. 697). Further, Tracey Coulter, who became a supervisor in June 2000, testified that container repair and processing employees had different breaktimes since at least October 1999 when she started work (Tr. 461, 470, 494–497).

The election was scheduled for Wednesday, March 8, 2000. (R. Exh. 25.) In the weeks before the vote, both the Union and

the Company passed out campaign literature (GC Exh. 9; Tr. 43). Company literature stated that:

> The union cannot guarantee employees anything. All that a union can do is sit down and negotiate with an employer. Under federal law, DynCorp is not obligated to agree to anything the union proposes. Although we would bargain in good faith, your current wages, benefits and hours would be negotiated along with everything else. You could wind up with more, less, or the same with a union than you already have.

(R. Exh. 24). According to Dawkins and Lawrence, they consistently told employees this same message throughout the campaign (Tr. 692–693, 864–865). Indeed, antiunion employee Teresa Jacques agreed that management said this (Tr. 661–664). And prounion employee Stacy Fields testified that Lawrence and Moore said that if the Union was elected employees' pay could drop and benefits, including the employee stock ownership plan (ESOP), could be lost but that pay and benefits could also go up or remain the same. In other words, everything would be subject to negotiation. (Tr. l71, 185, 187.) However, employee Chad Williamson remembered management saying that jobs could be lost if the Union won (Tr. 232). Employee Danny Hollon also testified that Dawkins, Moore and Lawrence said, "[E]verything that we had right now would be out the door, that everything would have to be negotiated and [t]here was no guarantee that we would get anything back that we had already." (Tr. 283–286.) According to employee Carl Moore, Dawkins said that the ESOP might be lost and that pay could go down to minimum wage. (Tr. 432.) Further, employee Johnna Stone testified that management assured employees that the USPS contract was good for another 2 years, though it was added that other unions had put other companies out of business. But she added that management said that employees would not lose benefits or salary. (Tr. 629–631.) According to employee Samantha Bishop, "a corporate guy" said that if the Union came in, "we would lose our benefits," and "they could lose the contract through the post office" (Tr. 200–203). Finally, according to employee Grant Turner, Supervisor Wade Moore said on February 15 that employees would lose the 30 cents an hour each had paid into the ESOP (GC Exh. 12; Tr. 338–341).

In February and early March, the West Chester plant was ablaze with prounion and "vote no" buttons worn by employees (Tr. 96, 664). Some employees, though, wore no buttons, including Linda Reynolds who declined Supervisor Tim Wolfe's offer to take a "vote no" button because she considered her position private (Tr. 103–104). According to employee Stacy Fields, who did wear a prounion button, Wolfe also asked, "different people," how they would vote in the election and passed out buttons to employees (Tr. 171–172). On one occasion, Supervisor Dale Lawrence told Fields, "[Y]ou're missing your ornaments today." According to Fields, Lawrence "just teased me" (Tr. 171–172, 684–685). Also, Lawrence approached employee John Groves with a "vote no" button in his hand one day. Groves took the button, whereupon Lawrence said, "I didn't think you were gonna take it." Groves then wore the button that day, and that day only, so as not to offend Lawrence (Tr. 95, 112–115, 691). Lawrence also asked employee Harold Godbey one day during the campaign where Godbey's "ornaments was." Lawrence then explained that he meant union buttons (Tr. 97). Also, employee Phillip Henderson was asked by Lawrence, who was not his direct supervisor, where his "metal [sic] of honors" were, and Lawrence later clarified that to mean union buttons. Lawrence further asked Henderson if he was on the union organizing committee and attended union meetings. Henderson said yes. Then, Lawrence told Henderson he was disappointed in his union activity (Tr. 290–292). One day later, Henderson asked Supervisor Wade Moore for some help on the job, as he had on previous occasions. Moore denied Henderson's request for the first time, however, stating that Henderson must meet his production quota first before receiving assistance, and that Henderson would be disciplined if he failed to meet his quota. But Moore relented the next day and gave Henderson the requested help (Tr. 293–297, 584–587). According to Lawrence, Wade first alerted him to problems with Henderson's production, a few weeks before, whereupon Lawrence instructed that Henderson's future request for help be denied (Tr. 686–688). Finally, Lawrence drove employee Todd Rossman to the hospital in early 2000. Rossman had worn no buttons and Lawrence did not know his stance on the Union. While passing the Backporch Restaurant and Bar, Lawrence asked if that was where the union meeting was held or remarked, "Oh, there's the Back Porch Tavern. That's where they're having union meetings." Lawrence had previously seen a prounion flyer at the plant mentioning that as the site of union meetings (Tr. 126–129, 679–682, 736–737).

The West Chester plant started operation in mid-1999 with two shifts. Twelve employees who so desired were transferred to first shift in June, July, September, and November 1999, plus one employee in January 2000. (R. Exhs. 16–17; Tr. 833.) Because of increased work, DynCorp created a third, overnight shift at the West Chester plant on February 14, 2000. Third shift offered fewer hours and no benefits. To fill those positions, volunteers from the first and second shifts were solicited. Thus, some first-shift vacancies were created, which were generally considered more desirable assignments (R. Exh. 18; Tr. 79, 347, 838–839). Five employees were transferred to first shift on February 28 (Tr. 81). Management then asked second-shift employees Samantha Bishop, Grant Turner, and Carl Moore, among others, just before the election if they wanted to move to first shift (Tr. 208–212, 345–347, 432–433). And three other employees were transferred to first shift on March 13, 1 week after the election, followed by eight more on March 27 (Tr. 81).

From February to early March, management held numerous meetings with assembled employees regarding the upcoming March 8 election. The last such meeting was held on either Monday, March 6, or Tuesday, March 7, during which Dawkins spoke from a prepared written text about "the upcoming union election . . . on March 8." Dawkins told the employees:

> Also ask yourself if you think that I now know the issues. You have done a great job of identifying areas that need to be changed. Example: Overtime, workflow issues, seniority issues, supervisory problems, policy issues.

> I am forbidden by law to tell you today that I am going to make changes. But I can assure that I recognize that there are changes that need to be made. It would be foolish for me not to address these issues. In fact it would be quite probable that significant changes would be made long before a contract is ratified.

(GC Exh. 6.) Dawkins testified that he spoke on March 6 to the assembled employees (Tr. 43, 46). Dawkins told the plant supervisors that there could be no such speeches less than 24 hours before the election (Tr. 771). Supervisor Tracey Coulter testified that the date of the final antiunion meeting was March 6 (Tr. 463), as did Second-Shift Supervisor Wade Moore, whose responsibility it was to gather his staff for the meeting (Tr. 556–560). Employee Johanna Stone also remembered Dawkins' final speech as being on March 6, and she was aware of a rule prohibiting any such speeches less than 24 hours before the election (Tr. 623–624). Employees Kathleen Pope and Teresa Jacques likewise placed Dawkin's final speech on March 6 (Tr. 652–654, 661–663). However, according to openly prounion employees Donna Sams, Jennifer Vaught-Riley, Danny Hollon, Grant Turner, and Carl Moore, Dawkins' speech was on March 7. Indeed, Sams, Hollon, and Moore all knew of the 24-hour rule. In fact, Sams was looking forward to working on March 7 without having to listen to any more antiunion speeches. Also, according to Turner, Dawkins said that "tomorrow is a big day" during the speech (Tr. 159–161, 166–168, 281–282, 344–345, 430–431). DynCorp time records reveal that first-shift employees spent 16.63 total hours in meetings on March 6 and that second-shift employees spent 29.67 hours in meetings that day. Grant Turner spent 0.51 hours attending a meeting on March 6, from 2:59 to 3:20 p.m. As for March 7, first-shift employees spent 11.83 total hours in meetings, second-shift employees totaled 7.65 hours, and third shift totaled 6.43 hours (GC Exh. 20; R. Exhs. 11–13). According to Dawkins, the March 6 totals are way above the normal meeting time associated with employees attending brief, routine meetings, which are usually held before the start of a shift (Tr. 818–823). Election Day was March 8 and the Union lost the vote, 94 to 114 (GC Exh. 1(k)).

Just after the election, on March 15, employee Grant Turner, the leading union adherent, received a written discipline from Supervisor Wade Moore for being out of his assigned work area, in the container repair section, without safety glasses. Turner was also cited for stopping productivity in this section by talking to other employees (R. Exh. 4). Wade had warned Turner orally in February for not wearing his safety glasses in the container repair area (Tr. 345–350, 573–575, 599, 602). The Company's written policy required employees to wear safety glasses at all times on the workroom floor (R. Exh. 5). And four or five employees have been disciplined for violating this policy, including two employees in November 2000 (GC Exh. 28; Tr. 903). Another employee was disciplined for not wearing safety boots in May 1999 (GC Exh. 28). Turner conceded his failure to wear safety glasses but explained that he was looking for eyeglass cleaner at the time (Tr. 350–352). According to Moore, Turner refused to sign for receipt of the discipline and then ripped up his copy. (Tr. 582.) Turner, however, claimed that Moore ripped it up when Turner complained that the election was over and lingering bitterness should end. But Turner added that Moore reinstated the written discipline, under orders from Lawrence, because Turner had filed charges against DynCorp on January 18, 2000, with the National Labor Relations Board alleging various violations of Section 8(a)(1) of the Act during the early stages of the union organizing campaign. (GC Exh. 1(a); Tr. 353–355.) Indeed, Turner testified that he told Lawrence in January 2000 that he had just filed charges against Lawrence and the Company. (Tr. 959.) Lawrence conceded that he decided to keep Turner's written discipline on file (Tr. 699–700). But he denied knowing about Turner's January 2000 charges until after the March 8, 2000 election. (Tr. 710–713, 715–716.) And while Dawkins maintained that he did not tell the supervisors that a charge had been filed, he conceded that he told supervisors that he needed to investigate certain allegations. (Tr. 843.)

On June 16, 2000, openly prounion employee Carl Moore was working on number one mailbags when his supervisor, Rhonda Bleska, told him to switch to orange plastic bags. It was often easier for a supervisor to switch an employee to another product than to search for additional, original product for that employee to continue working on. (Tr. 746–747, 761.) According to Moore, the number one bags were easier to do, he still had more of them to process, and he had never worked on orange plastic bags before. (Tr. 438–439, 446.) Because Moore had no secondary product that day, and was running low on his primary product, Supervisor Daniel Hobson also asked Moore to switch to the orange plastic three times and Moore refused three times, saying he would stay at his current post or go home. (Tr. 746–748, 785.) Moore thought he was being treated differently because employee Stacey Fields was asked to switch jobs also that day and, when she balked, management let her remain. (Tr. 441–443.) As for Fields, she asked Hobson if she could finish up one skid of work and Hobson agreed, whereupon Fields moved to the next job. (R. Exh. 7; 174–175, 786.) According to Fields, Moore still had some number one bags to finish and said he did not want to move to a low volume product. (Tr. 176–178.) With Moore still refusing to move, Hobson went to Supervisor Lawrence, who suspended Moore after talking with Dawkins. (Tr. 701–702, 785, 844.) Supervisors Coulter and Lawrence acknowledged that employees prefer to work on products they like best but added that employees are moved to unfamiliar products only when they run out of work. (Tr. 532, 725–727.) According to Dawkins, Moore's refusal to switch was unprecedented (Tr. 847, 911). So, he suspended Moore pending approval of his termination by DynCorp headquarters. (R. Exh. 19; Tr. 445, 450, 844–845.) Moore then filed a charge with the National Labor Relations Board on June 19, and was set to testify in the scheduled June 28 trial in this case, which was then postponed on June 23 because of Moore's additional charge. (GC Exhs. 1(q), (t), and (v); Tr. 447.) Moore's termination became final on June 22. (GC Exh. 13.)

On October 17 and 19, 2000, Grant Turner received two letters of reprimand for excessive absenteeism before October 9. But Dawkins rescinded the disciplines on October 23 upon

reviewing Turner's attendance records and determining that the disciplines were issued in error (R. Exh. 23; Tr. 378–383).

Employee's time and efficiency at the West Chester plant are tracked via an electronic "on-site information system," which is activated by an employee swiping his identification badge into a machine, and entering the proper labor code for the type of job he will be doing. The system then records that type of job along with where the employee is doing the job and how much of it he is doing (Tr. 61–62, 134–135, 766). Also, employees had to enter a separate work code for nonwork events such as attending meetings (Tr. 465). Meeting time did not count against employees' efficiency (Tr. 560). Thus, after laboring in to a preshift meeting, which was usually held for a few minutes, employees would then labor in to their primary product for the day (Tr. 193). But employees were not supposed to labor in to "downtime" because all employees had a primary and secondary product to work on at all times (Tr. 136, 477–478, 723). All employees were instructed verbally on how to account for their time via the electronic system (Tr. 539).

All employees were required to meet production quotas, i.e., daily and weekly 100-percent efficiency (Tr. 137–138, 255, 301–302). Employees were also encouraged to exceed the 100-percent level and, to this end, the Company started the "120 Club." If an employee reached 120- or 140-percent efficiency, he received a restaurant gift certificate (Tr. 119–120). Management would put employees' efficiencies on the bulletin board (Tr. 305, 359). To keep track of efficiencies, employees would fill out a placard with their identification number thereon to claim credit for the percentage of work they performed on a skid of product, and placed the placard on the skid (Tr. 139, 259). Some employees would have lower efficiencies because they were low on product (Tr. 306). So, they would, on their own, but with a supervisor's okay, find more product or ask other employees to give up some of their product (Tr. 255–256, 512).

According to several employees, certain supervisors told them to "buddy up" or help out their coemployees for the good of the Company (Tr. 137, 164–166, 181, 399). Specifically, Supervisor Tim Wolfe told employees Linda Reynolds and Helen Guffey to help other employees if they had already met their quotas for the day. So, for a few minutes at the end of her shift, on a few occasions a week, Reynolds helped other employees and did not take credit for this limited work (Tr. 105–106, 674). But Guffey never did so (Tr. 666–667). Wolfe likewise told employee Everlina Ragland to help another employee meet his quota, but not to labor in to a new work code to take credit for the work (Tr. 193–194). Wolfe also so instructed employee Mitzi Gunn (Tr. 300–303). Wolfe also told employee Donna Sams to "be a team player" and she did so by sharing her finished product if it was the same product as the other employee was working on (Tr. 155–158). Similarly, since May 1999 employee Debra Patterson sometimes received help for about 30 minutes at the end of her shift and she claimed the credit (Tr. 150–151). But employee Jennifer Vaught-Riley sometimes claimed credit for the extra work she performed and sometimes did not (Tr. 166). Further, employee John Groves would simply bring product to another employee towards the end of a shift, as opposed to working on the product. (Tr. 118, 122.) And some supervisors would merely instruct employees who had finished their daily quota to do some type of busy work such as "pull[ing] up pallets" (Tr. 141), to "unload the belt" (Tr. 195), or "unload the line" (Tr. 246), without switching labor codes. (Tr. 398–399.) Also, employees working on product out of the same bin would usually claim credit for 50 percent each, because that approximate split was accurate over the long term. In this regard, supervisors would not verify the claimed percentages. (Tr. 521–523, 641, 644–645, 657, 665–666, 675, 703.) Supervisor Coulter conceded that it was proper for employees to share product out of the same bin or to give away work to another employee trained on that product for a few minutes at the end of a shift. But she denied knowing of any employee taking credit for work they did not do in order to boost their efficiency. (Tr. 486–488.) Finally, as a matter of practice, employees on Friday mornings would claim credit for an entire skid which was partially finished by second-shift employees on Thursday evening, who would not return until Sunday. Then, on Sunday, second-shift employees would take full credit for partially finished skids left on Friday afternoon. This practice of "stealing" was discontinued by management in 1999. (Tr. 148–149, 413–415, 718.)

In the fall of 2000, employee Debra Patterson talked with then-fellow employee Tracey Coulter about the possibility of Robert Honnerlaw earning a 120-percent efficiency. Coulter said Honnerlaw needed one more skid to meet this quota. So, Patterson said she was already at 140 percent and would help Honnerlaw, whereupon Coulter said "great." Patterson then finished up the skid for Honnerlaw and gave him the credit (Tr. 143–146). Coulter later informed Honnerlaw that he had reached 120 percent, whereupon Patterson came over and said "Surprise, I did a skid for you." According to employee Mitzi Gunn, Coulter heard this. But Coulter and Honnerlaw only heard Patterson say "surprise." Coulter said, "[I]t's nice to have friends." (Tr. 308–309, 403–404, 491.) And Coulter denied knowing that Honnerlaw received credit for product he did not inspect. Rather, she maintained that she only suggested that Patterson do a little less so that Honnerlaw would have more product to reach the 120-percent level. (Tr. 489–490.)

From October 9 to November 1, 2000, Grant Turner's overall work efficiency was 76 percent, ranging from 43 to 94 percent. So, he received a written discipline on November 1 to improve by November 8 or face further discipline including termination. According to Turner, this low productivity was caused by his difficulty in obtaining product to work on. But Supervisor Coulter disagreed with Turner's contention. Turner then called Coulter a liar. (R. Exh. 6; GC Exh. 17; Tr. 362, 369, 480, 516–520, 769–770.) The next day, Turner prepared and had distributed a newsletter alleging unfair labor practices by management, detailing the progress of the trial in this case which was postponed several times, and urging employees to elect the Union. (GC Exh. 10; Tr. 453–455.) Dawkins denied seeing the letter. (Tr. 885.) Employees Mitzi Gunn and Rob Honnerlaw talked about helping Turner improve his efficiency, and Honnerlaw told Turner. Turner asked Honnerlaw if this was permitted and Honnerlaw said yes. Thereafter, Gunn, Honnerlaw and Delores Johnson did some work and gave Turner 25-percent credit on the affixed placards (GC Exh. 7;

Tr. 260–262, 310–312, 367, 406–409). Despite prodding from Honnerlaw to help Turner, employee Kathleen Pope warned Turner not to accept this work product (Tr. 649). With this assistance, Turner's efficiency jumped to 150 percent on November 2 and 113 percent on November 3. These numbers caught Coulter's eye because other records revealed that Turner was performing work on new product he was untrained on. So she talked about it with Dawkins (GC Exhs. 16–17; Tr. 475–477, 545–546, 849).

On Friday, November 3, Dawkins first met with Mitzi Gunn, whose name appeared along with Turner's on one placard. Gunn told Dawkins that she gave away some of her finished product to Turner, in accordance with established practice condoned by the supervisors (Tr. 313–314). Johnson also confessed to Dawkins (Tr. 266), as did Honnerlaw (Tr. 410). But when Dawkins asked Turner whether other employees were giving him finished product, Turner lied, claiming that he simply made an error in recording his work product. Turner explained that he wanted to protect his fellow employees (Tr. 371–373). Dawkins then called in his supervisors (Tr. 850). He asked them all if they knew about the practice of sharing work, without naming any names, and all of them—including Coulter, Lawrence, and Stephen Mokrovich—responded no (Tr. 484–485, 706–707, 767–768, 851–852). Dawkins explained that this was the first widespread, serious misconduct at the plant (Tr. 77–78, 915–916). Indeed, this misconduct undermined the Company's production incentive policies (Tr. 852), and prevented the Company from determining the true employee who worked on a product, which was required information if the product required reinspection (Tr. 530), or to trace which employee screwed up (Tr. 72–73). Accordingly, he fired Turner "some time later on" after questioning him, and then fired Johnson, Gunn, and Honnerlaw on Tuesday, November 7. (Tr. 268, 316, 373–374, 418.) Thereafter, remaining employees were told to stop sharing product. (Tr. 108–109.) Turner repeated the false explanation he gave to Dawkins in his affidavit to the National Labor Relations Board and to the Ohio Bureau of Unemployment Services. Turner explained that "I just panicked and I was on medication and I wasn't truthful." (R. Exh. 1; Tr. 385–389.). Before November 2000, the Company had fired other employees for fraud. (Tr. 65.) In November 1999, employee Tyronne Gunn was fired for leaving early and falsifying his time sheet. (GC Exh. 23.) In March 2000, William Hautman was fired for falsifying production data into the Company's electronic system. (GC Exh. 26.) But in late 1999, Chad Williamson was only suspended for 3 days for claiming credit for work he did not actually do, but blaming someone else. (Tr. 227–230.) According to Lawrence and Dawkins, however, it was not proven then that Williamson was at fault or falsified any documents. (Tr. 588–590, 859–861.) Lastly, in July 1999 Stan Williams scanned seven placards into the electronic system but did not attach them to any stacks. The placards were instead found on the floor. William only received a written discipline. (GC Exh. 25.)

III. ANALYSIS

The General Counsel's unfair labor practice allegations fall into two broad categories: The 8(a)(1) violations perpetrated during the spring 2000 campaign, and 8(a)(3) and (4) violations occurring after the March 2000 election. The 8(a)(1) allegations are as follows: (i) restricting employee access to the Company's bulletin boards; (ii) creating an impression of surveillance; (iii) restricting employee movement in the plant; (iv) interrogating employees regarding their union sympathies by three supervisors and the threat of more onerous working conditions against one of these employees; (v) promising and threatening loss of benefits; and (vi) giving a campaign speech within 24 hours of the election. The postelection 8(a)(3) allegations concern the discipline of one employee and subsequent discharges of five employees because of their union activity; two of which discharges the General Counsel alleges also violated Section 8(a)(4) because these employees had previously filed charges with the Board. The Union's three following objections to the election results parallel the complaint allegations: (i) handing out of "Vote No" buttons by management; (ii) promising better work hours to certain employees; and (iii) threatening loss of benefits if a union was voted in (ESOP, pay cuts).

A. The 8(a)(1) Violations

1. Prohibition against use of bulletin boards for union material

In December 1999, employee Grant Turner posted a letter on the Respondent's bulletin board seeking "interested parties" for the Union. Plant Manager Duncan Dawkins promptly removed the literature because the material violated the Respondent's unwritten rule against nonwork and personal postings. Dawkins also questioned Turner about the letter and warned him not to post similar notices on the board, stating that the bulletin board was for company use only. The General Counsel contends the Respondent violated Section 8(a)(1) by disparately banning union material from the Company's bulletin boards. The presiding judge agrees.

Generally, an employee or union does not have a right to use an employer's bulletin boards for union activity. However, once the employer makes the bulletin boards available for nonwork-related use, whether expressly or by practice, it may not discriminate against union material. See *Honeywell, Inc.*, 262 NLRB 1402 (1982); *Challenge Cook Bros. of Ohio, Inc.*, 153 NLRB 92 (1965), enfd. 374 F.2d 147 (6th Cir. 1967). What is more, an employer may not avail itself of a longstanding policy against posting, in order to preclude union-related material, if the employer has failed to enforce or object to postings in the past. See *Vincent's Steak House,* 216 NLRB 647 (1975). Indeed, if an employer does have a no-posting rule it is obligated to enforce the rule and ensure there is sufficient staff to police the bulletin boards. See *Fairfax Hospital*, 310 NLRB 299, 304 (1993) (citing *Ramada Inn of Fremont*, 221 NLRB 331 (1976)). Here, before the union campaign began, the evidence clearly reveals that the Respondent allowed employees to post personal notices on the cafeteria bulletin board for weeks at a time such as for-sale signs, announcements, and thank-you cards, notwithstanding a supposed longstanding no-posting policy. Moreover, management never disciplined any employee for violating this policy since the plant opened in May 1999. That suddenly changed, however, just after the initiation of the union

campaign in late 1999, when Dawkins, who should have known better, placed a "For DynCorp Use Only" sign above the bulletin board, removed all personal notices along with the union material, and warned Turner not to do it again. Therefore, the Respondent will be ordered to rescind the discriminatory no-posting rule.

2. Unlawful impression of surveillance

In early 2000, Second-Shift Supervisor Dale Lawrence allegedly created an unlawful impression of surveillance when he asked, or at least commented to, employee Todd Rossman about the Union's meetings at the Back Porch Restaurant. According to Lawrence, he said, "Oh, there's the Back Porch Tavern. That's where they're having Union meetings" when the two passed the restaurant upon returning to the plant from a hospital Lawrence had just driven Rossman to. Rossman testified that Lawrence gestured toward the restaurant and asked if that was the location of the union meetings. The Respondent asserts the question about the location of the union meeting was innocuous, and did not reasonably create an impression of surveillance because the union meetings were publicized at the plant. The presiding judge finds merit in the Respondent's defense.

At the outset, it is concluded that Lawrence's far more detailed description of his remark to Rossman is accepted over Rossman's vague recollection thereof. Thus, Lawrence did not actually interrogate Rossman about this matter. While an employer creates an unlawful impression of surveillance when an employee would reasonably assume their union activities had been placed under surveillance, see *Flexsteel Industries*, 311 NLRB 257 (1993), Lawrence's remark about the union meetings did not violate the Act. Indeed, Lawrence did not suggest that he knew which employees attended the meetings, the substance of any discussion at the meetings, or even that Rossman attended the meetings. See *Clark Equipment Co.*, 278 NLRB 498, 503 (1986). Further, the Union publicized its meetings at the Respondent's plant and Lawrence credibly testified that he saw a flyer at the plant stating that the Union held its meetings at the Back Porch Restaurant. Thus, Lawrence's remark would not reasonably create upon Rossman the impression that Lawrence was spying on the Union because the location of the union meetings was publicized. Compare *Ichikoh Mfg.*, 312 NLRB 1022, 1023 (1993) (supervisor's statement about covert union meetings would reasonably lead employees to assume that their union activities had been placed under surveillance). Accordingly, paragraph 5(a)(i) of the General Counsel's complaint will be dismissed.

3. Restriction of movement in the plant

A "demising wall" divides the Respondent's plant. The north side of the wall houses the processing department at one end and the container repair department at the other. The warehouse is located on the south side of the wall. A walkway runs along the south side of the wall to the lunchroom which employees are required to use when making their way to and from the lunchroom while on break. The General Counsel alleges that in early 2000 the Respondent forced employees in the heavily prounion container repair department to use the south side walkway in order to isolate them from employees in the processing department. In defense, the Respondent asserts that the rule, in effect since the beginning of operations in early 1999, only attempted to maximize safety and efficiency in the plant.

Clearly, the isolation of employees in response to union activity is unlawful. See *Standard Products Co.*, 281 NLRB 141, 142 (1986), enfd. in part 824 F.2d 291 (4th Cir. 1987). But the Respondent's policy at the West Chester plant, requiring employees to walk on the warehouse, or south, side of the demising wall, was a longstanding rule. First, on November 24, 1999, before the beginning of open union activity at the plant, the Respondent sent a memo to all employees stating that they should use the walkway when arriving at and leaving the plant. Although the General Counsel correctly notes that this memo did not specifically refer to breaks, it seems logical that the rule also applied during work hours because the walkway leads directly to the lunchroom from the warehouse. Moreover, the Respondent's explanation regarding the use of the walkway to minimize disruption of the processing department's work makes sense because that department lies in the path of container repair employees walking to the lunchroom. Second, Supervisor Wade Moore credibly testified that since the plant's opening in May 1999 he often told employees to use the walkway when walking from the container repair department to the lunchroom, so as not to impede production in the processing department and to ensure the safety of the employees.

As for the testimony of employees Danny Hollen, Samantha Bishop, Chad Williamson, and Grant Turner that management changed the route to the breakroom only after the union effort began, the presiding judge finds their recollection faulty. First, Turner is not a credible witness. He admittedly lied to the Respondent about sharing product with other employees, and he also lied to the Board and the state unemployment office concerning the same issue. Second, Williamson also testified that management further isolated employees by staggering breaktimes after the onset of union activity; testimony clearly refuted by the credible testimony of three supervisors—Lawrence, Coulter, and Moore. Thus, Williamson's deficient memory on this related matter casts doubt on his ability to recall whether the route was changed after the campaign began. Third, Hollen's and Bishop's somewhat vague version was probably colored by their likely knowledge that Turner was disciplined for walking on the north side of the wall shortly after the union campaign began. Thus, the preponderance of the evidence is that the walkway rule was promulgated in 1999, before the union effort began.

In sum, the presiding judge finds that neither the purpose nor the effect of the walkway rule unreasonably restricted employees' ability to engage in union organizing activities. Also, in view of Moore's uncontradicted testimony that he often verbally warned employees to use the south side walkway, it cannot be concluded that the Respondent disparately enforced the rule, by issuing a very general reprimand to Turner (GC Exh.

18), after the start of the union campaign.[2] Thus, paragraph 5(e) of the complaint will be dismissed.

4. Interrogations

The General Counsel next alleges that during the election campaign Supervisors Dale Lawrence, Tim Wolfe, and Chris Fair interrogated employees concerning their union views. Specifically, employee Stacy Fields, an outspoken proponent of the Union, wore prounion buttons regularly. While at her workstation, Lawrence stated, "[Y]ou are missing your ornaments today." Lawrence's statement was neither coercive nor interrogative because Lawrence knew Fields' position, and Fields uninhibitedly displayed her support for the Union. And significantly, Fields testified the comment was in jest. Thus, this statement did not violate the Act. See *Teksid Aluminum Foundry*, 311 NLRB 711, 715–716 (1993). But Lawrence unlawfully interrogated openly prounion employee Phillip Henderson during the union campaign. On a day he had not donned his union button, Lawrence inquired where his "metal of honors was?" Lawrence then continued, asking if Henderson was on the organizing committee or attended union meetings. Henderson answered in the affirmative. Before the interrogation, Lawrence gave no assurances that there would be no reprisals for answering truthfully. The conversation then ended with an implied threat: Lawrence stated he was disappointed with Henderson's union activity. Clearly, Lawrence' statements violated Section 8(a)(1) because, taking into account the totality of the circumstances, they reasonably tended to restrain and interfere with Henderson's exercise of his Section 7 rights. See *Rossmore House*, 269 NLRB 1176 (1984). Moreover, after the conversation Lawrence instructed Wade Moore, Henderson's immediate supervisor, not to give help to Henderson until his production levels increased. Prior to that time Henderson always received assistance when he asked. Regardless of whether this particular decision was based on a legitimate business reason, the timing of management's new policy toward Henderson strongly suggests that it was directly correlated to Henderson's union activity and Lawrence's preceding unlawful interrogation. Indeed, Lawrence conceded that he knew about Henderson's drop in production for a few weeks and yet did nothing about it until the union interrogation. Nor is Lawrence' misconduct vitiated by Moore's decision not to enforce Lawrence' edict. Therefore, management's threat of more onerous working conditions for Henderson likewise violated Section 8(a)(1). Next, Lawrence also unlawfully interrogated employee Harold Godbey, who, unlike Fields and Henderson, was not an active union supporter, asking him where his "ornaments" were. This type of interrogation by an employer of an employee whose union sentiments are not on open display is clearly an impermissible intrusion into the employee's union sentiments. Finally, Lawrence approached employee John Groves, while he was at his workstation, with a "vote no" button in his hand. While it is unclear as to whether Lawrence innocently approached Groves with the button or intentionally walked over so that that Groves would take it, Groves did take one of the two buttons Lawrence held in his palm. Lawrence then said, "I didn't think you were gonna take it." Groves credibly testified he only took the button so he would not upset Lawrence, and wore the button only for that 1 day. Under all the circumstances, especially Lawrence's numerous other illegal interrogations regarding buttons, the presiding judge resolves this issue in the General Counsel's favor. *Rossmore House*, supra. The plain fact is that Lawrence forced Groves to make a declaration of his support, regardless of the truthfulness thereof. See *Chris & Pitts of Hollywood, Inc.*, 196 NLRB 866 fn. 2 (1972). Thus, Lawrence's misconduct again violated Section 8(a)(1), requiring a remedial notice posting by the Respondent, and the Union's Objection 2 will be sustained.

Turning to Manager Tim Wolfe, he approached employee Linda Reynolds while at her workstation and asked her if she wanted a "vote no" button. Reynolds had not worn campaign buttons at work or otherwise disclosed her position on the Union. She declined Wolfe's offer, explaining her vote was private. Contrary to the Respondent's assertion, such an exchange constitutes an unlawful interrogation under the *Rossmore* analysis. It is well settled that when an employer requests an employee to wear an antiunion button, or makes available such buttons in a coercive fashion, such an act is tantamount to the interrogation of that employee because it requires him to make an open declaration of his support for or opposition to the Union. So, this incident constituted another 8(a)(1) violation and likewise warrants sustaining union Objection 2. See *Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978). Compare *Black Dot, Inc.*, 239 NLRB 929 (1978) (an employer may make antiunion buttons available in the cafeteria where there is no distribution by supervisors, and supervisors do not discuss the wearing of buttons with employees). Lastly, the General Counsel has failed to adduce any evidence regarding the allegation that Supervisor Chris Fair interrogated employees. Therefore, paragraph 5(h) of the complaint will be dismissed.

5. Benefits: promises and threats of loss

Management's written communications to the employees stated that a union could mean more, less, or the same wages and benefits. But the General Counsel and the Union allege that the Respondent orally threatened the employees with reduced wages and benefits during the election campaign. Specifically, it is alleged that Dawkins and Supervisor Wade Moore threatened employees with reduced wages and loss of the Company's 30-cent-per-hour contribution toward the ESOP if the Union won the election. According to Turner, Moore stated on February 15 that the 30-cent-per-hour contribution would be lost; a statement confirmed by a transcript of a tape recording of this conversation made by Turner. Also, despite the incompleteness of this transcript, Moore never testified that he added anything to the contrary during this conversation. Nevertheless, the presiding judge concludes that Wade's statement did not violate the Act. Significantly, it has not been proven that anyone other than Turner and Moore attended this "meeting." Indeed, these two men are the only participants identified in the transcript of the conversation, and Turner's trial testimony fails to establish the presence of anyone else at this February 15 encounter (Tr. 338–340). Moreover, a com-

[2] This discipline is not specifically alleged as a violation of the Act in the General Counsel's complaint.

plete reading of the conversation's transcript reveals that Turner, with his tape recorder running, cunningly led Wade off message from management's official line that all matters would be subject to negotiation. Also, Moore's answers to Turner's repeated questions are nothing more than rambling, somewhat incoherent explanations about the Respondent's plans for the ESOP. In sum, this "best evidence" that the General Counsel proffers about the Company's oral statements to employees during the election campaign about wages and benefits fails to prove this allegation.

As for other unrecorded, oral statements made by management, it is likewise concluded that neither the General Counsel nor the Union have satisfied their burdens on this issue. At the outset, the presiding judge finds employees Chad Williamson, Danny Hollon, Carl Moore, and Samatha Bishop all to be credible witnesses. However, Williamson could not identify which supervisor said that jobs could be lost if the Union won. As for the testimony of Hollon, Moore and Bishop regarding statements by Dawkins, Moore, and/or Lawrence that benefits would be lost or might be lost, it is far more likely that, in the face of all the evidence on this issue, these employees testified as to incomplete remarks they either heard or thought they heard from management, Indeed, Dawkins and Lawrence credibly testified that they consistently repeated the Company's written policy to employees when asked about what would happen to wages and benefits. Also, neutral employee Johnna Stone did not hear any threats about loss of salary or benefits, and prounion employee Stacy Fields and antiunion employee Teresa Jacques both remembered the oral presentations matching the written policy. Thus, it is concluded that the preponderance of the evidence establishes that the Respondent did not illegally threaten to reduce wages and benefits. Accordingly, the Union's Objection 4 will be overruled and paragraph 5(c) of the complaint will be dismissed.

Turning to the alleged illegal promises of benefits made by management during the campaign, the General Counsel and the Union point to offers to second-shift employees, including Grant Turner, Carl Moore, and Samantha Bishop, shortly before the election, to switch to the more desirable first shift. While the timing of such a promise certainly raises an inference that the Respondent attempted to bribe employees, thus, destroying the laboratory conditions of the March 8 election, the plain fact is that the first shift transfer plan was well established for months leading up to the election. Specifically, approximately 12 employees were transferred in 1999 alone. Then on February 14, 2000, for legitimate business reasons unrelated to the pending union election, the Company created a third working shift, thus, creating additional vacancies in the first shift in the midst of the election campaign. Thus, five employees were so transferred on February 28; an event the General Counsel did not allege as an unfair labor practice and the Union did not lodge an objection to. And because the employees were already well aware of the possibilities regarding first-shift transfers, the repetition of this announcement before March 8 did not violate the Act. See *Emery Worldwide*, 309 NLRB 185, 186 (1992). Thus, the Union's objection on this matter will be overruled and the General Counsel's allegation at paragraph 5(f) will be dismissed.

The second alleged preelection promise concerns Duncan Dawkins' final speech to the employees just before election day, March 8. Therein, the General Counsel alleges that Dawkins impliedly promised to remedy specific employee complaints by reading the following from a written text:

> Also ask yourself if you think that I now know the issues. You have done a great job of identifying areas that need to be changed. Example: Overtime, workflow issues, seniority issues, supervisory problems, policy issues.
>
> I am forbidden by law to tell you today that I am going to make changes. But I can assure that I recognize that there are changes that need to be made. It would be foolish for me not to address these issues. In fact it would be quite probable that significant changes would be made long before a contract is ratified.

It is true that an employer's sudden willingness to address promptly the complaints of employees during a union campaign is unlawful and inherently interferes with an employee's free choice in the election. See *Gray Line of the Black Hills*, 321 NLRB 778, 791 (1996) (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944)). However, Dawkins' speech did not imply a promise to remedy grievances because the grievances Dawkins enumerated were extremely vague: overtime, work flow issues, seniority issues, supervisory problems, policy issues. See *Bakersfield Memorial Hospital*, 315 NLRB 596, 601 (1994); compare, *Pennsy Supply,* 295 NLRB 324, 325 (1989) (supervisor's statements about health and retirement plans were specific). In this regard, the General Counsel has failed to adduce any evidence regarding the existence of any of these problems at the West Chester plant, much less that any of these problems were debated during the election campaign. Thus, the General Counsel's allegation at paragraph 5(b)(ii) of the complaint will also be dismissed.

6. Allegation of speech made within the 24 hours prior to the election

An employer and union are prohibited from making election speeches to massed employees on company time within 24 hours of the scheduled time for conducting the election. *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). The *Peerless* rule, however, does not prohibit an employer from distributing campaign literature, talking individually with employees, or answering unsolicited questions from the employees, as long as the words or actions of the employer are not coercive. See *Andel Jewelry, Corp.*, 326 NLRB 507 (1998); *Associated Milk Producers*, 237 NLRB 879 (1978).

The General Counsel alleges that Duncan Dawkins made a speech to second-shift workers on March 7, 2000, at 3 p.m., within 24 hours of the start of the election. But the preponderance of the record evidence shows otherwise. First, three supervisors, including Wade Moore and three employees, two of whose union sympathies are unknown, credibly testified that Dawkins delivered the speech on March 6. Indeed, it was Moore's job to gather second-shift workers for such a meeting. And one of those employees, Johnna Stone, whose union sympathy is unknown, was aware of the 24-hour rule, thus, giving added significance to her fixing of the March 6 date. Second,

the Respondent kept detailed records of the amount of time employees spent in meetings each day. On March 6, second shift employees aggregately spent nearly 30 hours in meetings, whereas on March 7, the day before the election, those same employees spent only 7-1/2 hours in meetings, which Dawkins explained was their average time spent in regular preshift meetings. Third, as for Turner's claim that Dawkins said, "[T]omorrow is a big day," that statement is not contained in Dawkins' prepared text. And, as explained supra, Turner has not distinguished himself as a credible witness in this case. While four other credible prounion witnesses fixed the speech as being delivered on March 7, in all likelihood these are references to informal, permissible meetings Dawkins may have conducted within the 24-hour period. Therefore, paragraph 5(b)(iii) of the complaint will be dismissed.

B. The 8(a)(3) Violations

1. Written discipline issued to Turner

Since the opening of the Company's West Chester plant in 1999, the Respondent has required all employees to wear safety glasses in the container repair area of the plant. After the election, on March 15, 2000, employee Grant Turner received a personal improvement plan (PIP), the Respondent's version of a written reprimand, for being out of his work area and for failure to wear safety glasses in container repair area. On the day before, Supervisor Wade Moore warned Turner not to come into the container repair division without safety glasses, and to refrain from talking to other employees on the job. According to the General Counsel, the Respondent disciplined Turner because of his role in the union effort, thus, violating Section 8(a)(3). The Respondent, however, argues that the discipline was issued because of Turner's failure to follow standard procedure. To prove its allegation, the General Counsel must show by a preponderance of the evidence that the employee's protected Section 7 activity was a motivating factor in the Respondent's decision to discipline him. If so proven, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that its action was based on lawful reason(s), and would have occurred absent the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp*., 462 U.S. 393 (1983).

The presiding judge concludes that the General Counsel has met his initial burden. Specifically, the Respondent demonstrated union animus as evidenced by its 8(a)(1) violations concerning the banning of union literature from the company bulletin board, interrogations regarding antiunion and union buttons, and threat of more onerous working conditions to one employee. However, it is also concluded that the Respondent has adequately rebutted the General Counsel's showing. The Company's policy was crystal clear: wear safety glasses in the container repair department. Turner failed to abide by the rule, and consequently received a verbal warning. The very next day, Turner again failed to wear his glasses, thus justifying a written discipline to ensure the safety of all employees. Moreover, the fact that Turner received the March 15, 2000 discipline just days after the unsuccessful union campaign does not undermine the justification of the discipline inasmuch as the Respondent had a clear, existing rule in place and had enforced another safety equipment rule against another employee previously. Finally, regarding the 8(a)(4) allegation, the presiding judge discredits Turner's testimony that Moore tore up the PIP after Turner explained his personal situation and said that it was time for vindictiveness and bitterness to end, and that Supervisor Lawrence later reinstated the PIP. Rather, Moore's explanation that Turner ripped up his own copy of the reprimand is the more logical version of events. Indeed, when the PIP was ripped up by Turner, Lawrence already had a copy on file and there was never a cancellation of the discipline. Thus, the PIP was not subsequently reinstated by Dale Lawrence, as alleged by General Counsel, because of Turner's filing of a charge with the Board. Therefore, the General Counsel's 8(a)(3) and (4) allegations in paragraphs 6(a) and (g) of the complaint will be dismissed.

2. Suspension and discharge of Carl Moore

Employee Carl Moore worked on canvas mailbags on June 16, 2000. A supervisor, Rhonda Bleska, asked him to switch products and work on orange plastic bags. Moore was proficient on the canvass bags, but had never worked with the orange bags. He refused to switch product. Bleska asked Supervisor Daniel Hobson for assistance. Hobson asked Moore three times to switch to the orange bags. Moore refused. Hobson then told Supervisor Dale Lawrence about the problem. After the next break, Lawrence called Moore and Hobson into his office where he asked Moore if he would switch products. Moore again refused. Lawrence then suspended Moore pending approval of his termination by company headquarters. Moore then filed a charge with the Board on June 19, and his termination became final on June 22.

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (4) when it suspended and subsequently discharged Carl Moore because of his union adherence, and for filing the June 19 charge. But the Respondent counters that the disciplinary actions were based solely on Moore's insubordination. In the presiding judge's view, the Respondent is correct. Significantly, three supervisors asked Moore a total of five times to switch product, and each time he refused. The record evidence reveals that no employee had ever flatly refused to perform an assigned task. See *Williamson Piggly Wiggly*, 280 NLRB 1160, 1171 (1986), enfd. granted 827 F.2d 1098 (6th Cir. 1987). In addition, the timing of this event was far removed from the March 2000 union campaign, lessening the likelihood that union animus was the motivating factor. Also, there was no disparate treatment of Moore that day. On the contrary, openly prounion employee Stacy Fields was also asked to switch products, and she ultimately agreed. Finally, there is insufficient evidence to conclude that Moore's June 19 charge with the Board had anything to do with his termination. Rather, the die had already been cast for his termination on June 16. Therefore, paragraph 6(c) of the complaint will be dismissed.

3. Discharges of Turner, Honnerlaw Johnson, and Gunn

The Respondent required each employee to produce at a 100-percent level. On November 1, 2000, 8 months after the elec-

tion, the Respondent reprimanded Turner because his productions levels were on average only 76 percent, well below the standard set by the Company. He received a PIP advising him to increase his production or face disciplinary measures, including possible termination. On November 2, 2000, upon a routine check, Turner's supervisor, Tracy Coulter, noticed his production level had jumped to 150 percent and he was working on a product on which he was not trained. After investigating the peculiar increase in productivity, management discovered on Friday, November 3, 2000, that Turner had accepted finished product from employees Robert Honnerlaw, Mitzi Gunn, and Delores Johnson in order to increase his own production level. Duncan Dawkins then questioned all four employees, and all but Turner admitted they engaged in the practice. Shortly thereafter, the Respondent discharged Turner for fraud. Likewise the Respondent fired the other three employees on Tuesday, November 7. According to the General Counsel and the Union, the Respondent continued its antiunion retaliation by discharging union leader Grant Turner and firing the three other employees. In defense of its action, the Respondent argues that these employees manipulated their work performance to the detriment of the Company, and were justifiably discharged.

Again, as documented supra, it is concluded that the General Counsel met his initial *Wright Line* burden. Indeed, Turner was the most outspoken of all union supporters; during the campaign he distributed leaflets, signed union postings, and was generally visible as the union campaigner. In addition, the day before his discharge he distributed union material condemning management and calling for a new election. Nonetheless, the Presiding Judge concludes that the Respondent has once again rebutted the General Counsel's showing. First, the Respondent discharged the four employees for legitimate business reasons. Here, the Company had a strong interest in knowing which employees were producing and those which were not. In fact, there was a system in place to reward successful employees or, in the case of Turner, to discipline him because his production levels were too low. And when faced with the possibility of discipline, Turner did not attempt to increase his productivity, but instead embarked on a course of action to defraud the Respondent deliberately despite being warned by one other employee not to accept completed product from others. Further, the Respondent's policy made sense from a quality control standpoint because it allowed the Company to trace which employee worked on which product if the product needed reinspection. Second, there is no evidence that the Respondent seized on the product sharing incident as a pretext to get rid of Turner and the three others. Initially, it is significant that in October 2000 Turner erroneously received written disciplines for absenteeism, which the Respondent rescinded upon learning of its mistake. Regarding the November 2000 incident, the preponderance of the evidence shows that the product sharing was not a regular or endorsed practice at the Respondent's facility. Dawkins credibly testified he was not aware of the practice. Nor should such knowledge be imputed to Dawkins because two supervisors condoned product sharing. In this regard, the preponderance of the evidence fails to show that Supervisor Tracey Coulter acknowledged and encouraged the practice of sharing product. Rather, based on Coulter's and employee Robert Honnerlaw's testimony that employee Patterson merely said, "surprise," it is concluded that Coulter did not know that Patterson actually did work for Honnerlaw. As for rogue Supervisor Tim Wolfe, there is plenty of evidence that he encouraged the practice. But he was gone by sometime after the election and there is no evidence that other supervisors continued Wolfe's policy. Simply put, Dawkins, who made the decision to terminate the four employees, credibly testified he did not know about the sharing practice and there is insufficient basis for imputing such knowledge to him. Compare *JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985) (supervisor's direct culpability in employee's discharge is imputed to executive who fires employee); *Springfield Air Center*, 311 NLRB 1151 (1993) (knowledge of employee's protected, concerted activity imputed to management official who made decision to discharge employee). Third, Turner knew such a practice to be fraudulent, based on employee Kathleen Pope's warning to him beforehand and his failure to check this out with management. And there is Turner's ultimate lie when confronted by management on November 3. As for Johnson, Honnerlaw and Gunn, who were less culpable and more truthful with Dawkins, the Respondent still had the right to terminate them for fraud.

Finally, there is insufficient evidence that Turner's distribution of a union memo on November 2, 2000, was the catalyst for the discharges. Notably, Dawkins credibly testified he did not see the memo before November 7, and there is no substantial evidence to the contrary. Accordingly, it is concluded that the Respondent justifiably discharged employees Turner, Gunn, Honnerlaw, and Johnson. Therefore, paragraphs 6(d) and (e) of the complaint will be dismissed.

THE REMEDY

As discussed supra, a remedial notice posting will be required in view of the Respondent's violations of Section 8(a)(1). As for the unproven 8(a)(3) allegations regarding five employees, no remedial action is required. Thus, the only remaining issue is whether a second election is warranted. In the instant case, the Respondent committed two 8(a)(1) violations by discriminating against union material posted on a company bulletin board and by interrogating employees. Typically, the remedy for such violations of the Act, during the critical period, i.e., after the filing of an election petition, is a new election, because such conduct interferes with the exercise of free choice therein. See *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). However, it is well settled that only conduct occurring during the critical period warrants a second election. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, (1961). The Board only departs from this rule when the clearly proscribed activity is likely to have a *significant* impact on the election. *Royal Packaging Corp.*, 284 NLRB 317 (1987) (emphasis added).

Here, the Respondent implemented the discriminatory no-posting rule on December 20, 1999, over 1 month before the filing of the petition. Although the ban on union bulletin board postings naturally continued thereafter, this type of misconduct pales in comparison to prepetition misconduct that has been deemed to have significantly impacted the outcome of an election. Compare *Bon Marche*, 308 NLRB 184 (1992) (bulletin

board violation, and other violations during critical period, warrant a new election); *Toys-R-Us, Inc.*, 300 NLRB 188, 190 (1990) (promise to raise wages for withdrawal of union support was "sufficiently serious and widespread"); *L & J Equipment Co.*, 278 NLRB 485, 488 (1986) (setting fire to a truck created an atmosphere of fear and coercion interfering with the election choice). Rather, the discriminatory no-posting rule is analogous to less serious prepetition violations where a new election was not ordered. See *Kokomo Tube Co.,* 280 NLRB 357, 358 (1986) (a 25-cent-wage increase announced before the filing of a petition was insufficient to warrant a new election), overruled on other grounds by 332 NLRB 40 fn. 8 (2000). Next, the Regional Director, in his report on the Union's objections and order consolidating those objections with the General Counsel's complaint, citing *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), asserts that objectionable conduct uncovered by the General Counsel may be grounds for setting aside an election notwithstanding the fact such conduct was not specifically objected to by the Union. However, that case concerns only misconduct falling within the critical period. Even so, aside from the telling fact that the Union did not object to the bulletin board misconduct, presumably because it believed the violation did not affect the outcome of the election, the Regional Director similarly failed to list the bulletin board violation, in his order regarding the objections, as a significant basis for invoking the *White Plains* doctrine. By contrast, the Regional Director listed the interrogation and threat issues, alleged by the General Counsel as unfair labor practices, as possible additional grounds for setting aside the election. See *Bandag, Inc.,* 225 NLRB 72 (1976), enf. granted in pertinent part 583 F.2d 765 (5th Cir. 1978). Accordingly, based on the foregoing reasons, the presiding judge finds that the bulletin board violation is an insufficient basis upon which to set aside the election.

That leaves us with one 8(a)(1) violation committed by the Respondent during the critical period which parallels one of the Union's objections—the interrogations by two mid-level supervisors of four employees about their union sympathies via union and vote no buttons, and a followup threat of more onerous working conditions against one of those employees by the same supervisor. And the ultimate question is whether this misconduct warrants setting aside the results of the March 8, 2000 election. The Board will depart from the policy of ordering a new election when, analyzing "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors," the violation are concluded to be de minimis. See *Super Thrift Markets,* 233 NLRB 409 (1977). The violations here affected only 4 employees out of over 200 voting, with a margin of 20 votes between the Union and the Respondent. Also, there is no evidence of dissemination of these interrogations and the sole threat. Under these circumstances, it is concluded that the impact of the violations on the election outcome was de minimis and does not present proper grounds for setting aside the election. See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (set aside not warranted where employer commits several violations involving 8 employees in a 800-man unit during an open and active campaign), overruled in part on other grounds in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

CONCLUSIONS OF LAW

1. The Respondent, DynCorp, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, American Postal Workers Union, Local 164, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act in December 1999 by prohibiting the posting of union literature on the Respondent's bulletin board and threatening an employee with discipline, as alleged in paragraphs 5(b)(i) and 7 of the General Counsel's complaint.
4. The Respondent violated Section 8(a)(1) of the Act in early 2000 by interrogating and soliciting employees concerning union buttons, as alleged in paragraphs 5(a)(ii), (iv), (d), and 7 of the General Counsel's complaint.
5. The Respondent violated Section 8(a)(1) of the Act in early 2000 by threatening an employee with more onerous working conditions, as alleged in paragraphs 5(a)(iii) and 7 of the General Counsel's complaint.
6. The General Counsel has failed to prove his allegations in paragraphs 5(a)(i), (b)(ii), (iii), (c), (e), (f), (g), (h), 6(a)–(g), 8, and 9 of the complaint.
7. The unfair labor practices of the Respondent, described in paragraphs 3, 4, and 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.
8. The Union's Objection 2 is sustained.
9. The Union's Objections 3 and 4 are overruled.

[Recommended Order omitted from publication.]